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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

NUT TREE HOLDINGS, LLC, Plaintiff and Appellant, v. CHRISTINE BAKER, as Director, etc. Defendant and Respondent; CITY OF VACAVILLE, et al., Real Parties in Interest and Respondents.	A150087 (Solano County Super. Ct. No. FSC045697)

Nut Tree Holdings, LLC (the Developer) filed a petition for writ of mandate (Code Civ. Proc., § 1085), challenging a Department of Industrial Relations (DIR) determination that the Developer's project was a "public work" within the meaning of the prevailing wage law (Lab. Code, § 1720 et seq.; the PWL).[1] The trial court denied the petition, and we affirm.

BACKGROUND

In November 2010, the Developer entered into an agreement titled "Amended and Restated Disposition and Development Agreement (Nut Tree Property)" (the Agreement) with the City of Vacaville (the City) and the Vacaville Redevelopment Agency (the

[1] All undesignated section references are to the Labor Code.

Redevelopment Agency).[2] The Agreement amended, restated, and superseded a previous agreement to construct a mixed-use development project, which we will refer to as the Nut Tree Project.[3] The Agreement provided for the Redevelopment Agency and the Developer to "exchange certain real property [in the Nut Tree Project area], and establish the terms and conditions for the development thereof . . . ."

The Agreement's property exchange terms provided for the Redevelopment Agency to convey multiple parcels to the Developer for one dollar, and for the Developer to convey multiple parcels to the Redevelopment Agency for one dollar. Before the Agreement was executed, two documents estimated the fair market value of the various properties to be exchanged.[4] The first was a report prepared by the Redevelopment Agency pursuant to Health and Safety Code section 33433 (the 33433 Report), which required a redevelopment agency, prior to selling property, to secure and make publicly available a report containing certain information, including the highest and best use value of the interest to be conveyed. The 33433 Report estimated the total value of the property to be conveyed from the Redevelopment Agency to the Developer was approximately $12 million, and the total value of the property to be conveyed from the Developer to the Redevelopment Agency was approximately $2.5 million. The second document was an appraisal prepared by Webster & Company LLC for Wells Fargo Bank (the Webster Report). The Webster Report estimated the total value of the property to be conveyed from the Redevelopment Agency to the Developer was approximately $8.9 million, and the total value of the property to be conveyed from the Developer to the Redevelopment Agency was approximately $2.5 million. Using the values set forth in

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[2] An entity called Nut Tree Retail, LLC, which the Developer characterizes as its "affiliate", was also a party to the Agreement. For convenience, we will refer to both Nut Tree Holdings, LLC, and Nut Tree Retail, LLC, as the Developer.

[3] Additional background details about the previous agreement are not relevant to our resolution of this appeal.

[4] The Developer does not suggest it was not provided with these documents before the Agreement was executed.

the 33433 Report, the property conveyed to the Developer was worth $9.5 million more than the property the Developer conveyed to the Redevelopment Agency; using those in the Webster Report, the property conveyed to the Developer was worth $6.4 million more.

In addition to the property exchange, the Agreement provided for the Redevelopment Agency to pay approximately $2.5 million to the Developer, or on the Developer's behalf, in payments to the City which the Developer "shall have the right to allocate . . . towards payment of [certain development fees] applicable to some or all of the" property conveyed to the Developer, and in reimbursements to the Developer for actual costs and expenses incurred in the construction of certain required public improvements. The Agreement imposed certain obligations on the Developer, including specific construction obligations. Finally, the Agreement provided that prevailing wages shall be paid for development construction work, except where DIR or a court determines the payment of prevailing wages is not required.

In July 2011, the Developer requested DIR issue a public works coverage determination for the Nut Tree Project. In December 2012, while this coverage determination was pending, the Developer obtained a valuation report from CBRE, Inc. (the CBRE Report). The CBRE Report provided a "retrospective value as of July 1, 2009" for one of the parcels that was conveyed from the Developer to the Redevelopment Agency pursuant to the Agreement, valuing it at $6.1 million.[5] The same property was valued at $1.2 million and $1.5 million by the 33433 Report and the Webster Report, respectively.

In August 2014, DIR issued a determination that the Nut Tree Project was a public work subject to prevailing wage requirements. The determination rested on two alternative grounds: First, the Redevelopment Agency's payments to the Developer constitutes " '[t]he payment of money . . . by the state or political subdivision directly to

[5] There is no explanation why the Developer requested the valuation as of July 1, 2009—a date well over a year before the Agreement was executed.

or on behalf of the . . . developer' within the meaning of section 1720, subdivision (b)(1)"; and second, the Redevelopment Agency's conveyance of property to the Developer "constitutes a transfer of an asset for less than fair market price under section 1720, subdivision (b)(3)."

In September 2014, the Developer administratively appealed the determination pursuant to DIR regulations. In April 2015, while the administrative appeal was pending, the Developer obtained a "consultation report" from Integra Realty Resources (the Integra Report), providing a retrospective value as of November 2010—the date the Agreement was executed—of the properties exchanged pursuant to the Agreement. The Integra Report used the CBRE Report's valuation, with certain adjustments, and concluded the properties conveyed from the Redevelopment Agency to the Developer were worth approximately $1.9 million more than the properties conveyed from the Developer to the Redevelopment Agency. In June 2015, DIR issued a decision denying the administrative appeal and affirming the initial determination on both grounds. DIR also rejected the Developer's arguments that certain statutory exceptions applied.

The Developer filed a petition for writ of mandate (Code Civ. Proc., § 1085) challenging DIR's decision on appeal, which the trial court denied without analysis. This appeal followed.[6]

DISCUSSION

I. *The PWL*

" 'The conditions of employment on construction projects financed in whole or in part by public funds are governed by the prevailing wage law.' [Citation.] 'The overall

[6] The Northern California Carpenters Regional Council (the Union) filed an opposition to the Developer's administrative appeal and filed briefs as a real party in interest in the writ proceedings below and on appeal. The City did not file a response brief on appeal. The Redevelopment Agency has presumably been dissolved pursuant to "2011 . . . legislation dissolving all redevelopment agencies and transferring control of their assets and responsibility for their obligations to the cities and counties that had created them." (*Cinema West, LLC v. Baker* (2017) 13 Cal.App.5th 194, 198 (*Cinema West*).) No party suggests this dissolution impacts the instant appeal.

purpose of the prevailing wage law is to protect and benefit employees on public works projects.' [Citation.] 'Section 1771 [of the PWL] provides that not less than the general prevailing rate of wages must be paid to all workers employed on public works projects costing more than $1,000.' [Citation.] As a prevailing wage law, the PWL 'is liberally construed to further its purpose.' " (*Cinema West, supra,* 13 Cal.App.5th at pp. 204–205.)

"Section 1720 broadly defines 'public works' to mean, with an exception not relevant here, '[c]onstruction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds.' (§ 1720, subd. (a).) . . . [¶] The phrase 'paid for in whole or in part out of public funds' in section 1720 is . . . broadly defined." (*Cinema West, supra,* 13 Cal.App.5th at p. 205.) The statutory definition includes, as relevant here, "[t]he payment of money or the equivalent of money by the state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer," and "[t]ransfer by the state or political subdivision of an asset of value for less than fair market price." (§ 1720, subd. (b)(1), (b)(3).) The PWL provides projects paid for in whole or in part out of public funds are nonetheless not public works if they meet certain narrow, specified requirements. (§ 1720, subd. (c).)

"The Director [of DIR] is responsible for . . . , on request, determining 'whether a specific project or type of work awarded or undertaken by a political subdivision is a public work.' (§ 1773.5, subds. (b), (c).)" (*Cinema West, supra,* 13 Cal.App.5th at p. 205.) "After the Director makes a coverage determination, interested parties may appeal. [Citation.] . . . The Director's authority to determine coverage of projects or types of work under the PWL is 'quasi-legislative,' and 'subject to judicial review pursuant to Section 1085 of the Code of Civil Procedure.' " (*Id.* at p. 206.)

" 'Our Supreme Court has treated the question of whether the PWL applies to a specific project as a question of statutory interpretation to which a court applies its independent judgment, rather than reviewing to determine whether the agency's decision was arbitrary and capricious. [Citation.] Therefore, except to the extent that we defer to any findings of fact made by the trial court that are supported by substantial evidence,

"we must exercise our independent judgment in resolving whether the project at issue constituted a 'public work' within the meaning of the PWL." [Citation.] "Where . . . the facts are undisputed, and the purely legal issues involve the interpretation of a statute an administrative agency is responsible for enforcing, we exercise our independent judgment 'taking into account and respecting the agency's interpretation of its meaning.' . . . The agency's interpretation is ' "one of several interpretive tools that may be helpful. In the end, however, '[the court] must . . . independently judge the text of the statute.' " ' " ' [Citation.] [¶] In reviewing the trial court's findings for substantial evidence, 'we resolve all conflicts in favor of the prevailing party, indulging in all legitimate and reasonable inferences from the record.' " (*Cinema West, supra,* 13 Cal.App.5th at pp. 206–207.)

II. *The Nut Tree Project Is Paid for Out Of Public Funds*

The Developer argues that the Agreement "was a complex transaction involving the transfer of no less than 14 parcels, plus numerous payments and contributions from the City/[Redevelopment] Agency to [the Developer], and from [the Developer] to the City/[Redevelopment] Agency. In a transaction such as this, the only way to determine whether any asset has been transferred at less than fair market price is to examine the entire transaction." (Italics omitted.) We will assume that the entire transaction, as the Developer defines it, must be considered to determine whether the project was paid for out of public funds (an issue the parties vigorously dispute and on which we express no opinion). We will also assume that the Redevelopment Agency paid only $2.5 million—the development fees and reimbursement for certain public improvement costs—to the Developer or on the Developer's behalf.[7]

We nonetheless conclude the Nut Tree Project is paid for in part out of public funds because we reject the Developer's two additional contentions: (1) that the Integra Report, which found the Redevelopment Agency conveyed properties worth only $1.9 million more than the properties it received, provided the "best and most comprehensive

[7] The Developer argues DIR erroneously considered additional obligations of the Redevelopment Agency to be payments to the Developer. We need not decide this issue.

analysis of the value of the land," and (2) that the Agreement imposed numerous obligations on the Developer requiring the Developer to spend approximately $7.6 million.[8]

With respect to the property valuations, DIR relied primarily on the valuations in the 33433 Report. The Developer argues DIR should have instead relied on appraisals performed by certified appraisers. But DIR also relied on the appraisals in the Webster Report, which were performed by a certified appraiser. Moreover, DIR expressly rejected the CBRE Report, reasoning as follows: "This appraisal was conducted in December of 2012, more than two years *after* the effective date of the [Agreement], and while the request for a public works determination was pending. It purported to present a 'retrospective value' of Parcel 4 as of July 1, 2009, based on the assumption that the condition at the time of inspection was not materially different than on the date of value 'according to discussions with' Ricardo Capretta [the Developer's managing member]. In other words, more than two years after effective date of the [Agreement], Mr. Capretta solicited a 'retrospective' appraisal of one of the parcels, the factual grounds and parameters of which were based on his own discussions with the appraiser. It is a sound exercise of the Director's discretion not to disregard the contemporaneous Section 33433 Report and Webster Appraisal, in favor this after-the-fact 'retrospective' appraisal obtained unilaterally by one of the parties with a clear self-interest, under circumstances that were intended to influence the public works determination. Had Mr. Capretta or any other party to the [Agreement] believed that the Section 33433 Report and Webster Appraisal were materially inaccurate as to the estimated property values *at the time* the [Agreement] was in development and under review, and given the obvious significance of the property valuations for purposes of the [Agreement] and the resulting legal obligations of the parties, it was incumbent on that party to seek an alternative evaluation

[8] Using these figures, as well as the $2.5 million in payments by the Redevelopment Agency to the Developer, the Developer argues the Agreement resulted in a net gain to the City and/or Redevelopment Agency of approximately $3.2 million.

or appraisal prior to the statutorily-required approvals of the [Agreement] by the involved agencies." DIR rejected the Integra Report, which relied on the CBRE valuation, for the same reasons.

"The value of real property is a question of fact." (*County of Los Angeles v. Southern Cal. Edison Co.* (2003) 112 Cal.App.4th 1108, 1121.) " ' "[I]n resolving whether the project at issue constituted a 'public work' within the meaning of the PWL," ' " a reviewing court must " 'defer to any findings of fact made by the trial court that are supported by substantial evidence . . . .' " (*Cinema West, supra*, 13 Cal.App.5th at p. 206.) Even assuming DIR should have relied on values determined by a certified appraisal rather than the 33433 Report valuations, DIR expressly credited the Webster Report valuations and discredited those in the CBRE and Integra Reports. The trial court, in denying the petition, impliedly so found. We defer to this implied finding, which is amply supported by substantial evidence. Using the Webster Report appraisal figures, the property conveyed by the Redevelopment Agency to the Developer was worth $6.4 million more than the property conveyed from the Developer.[9]

As for the Developer's assertion that the Agreement obligates it to contribute $7.6 million, the Developer sets forth a chart listing 17 separate obligations, with references to the Agreement's provisions, and a dollar amount for each obligation. The only record citation provided is to a letter brief submitted by the Developer in the administrative appeal, which includes the same chart. As the Union notes, this chart provides no evidentiary support for the dollar amounts included or even any explanation for the figures. Further, as to 15 of the items, the cited Agreement provisions also provide no valuation of the obligation. As for one of the two remaining items, the Agreement

[9] The Developer argues, in the alternative, that even if reliance on the 33433 Report was proper, DIR should have used the "fair reuse values" in the 33433 Report, rather than the fair market values. Because none of the certified appraisals included "fair reuse value" figures, this argument has no application if, as the Developer primarily contends, certified appraisals should be used. In any event, the Developer's argument—that the statutory phrase "fair market price" means "fair reuse value"—has no basis in the statute's plain language and no support in the case law.

imposes a *contingent* obligation: transfer fees payable to the Redevelopment Agency only in the event that the Developer sells or transfers its interest in its Nut Tree Project properties.

Most concerning, for five of the purported obligations—including such specifics as the obligation to "Landscape View Corridor Freeway Parce[l]," "Landscape Caltrans Freeway Parcel," and "Construct Nut Tree Road Extension"—the cited Agreement provisions state only that the Developer shall execute *other* agreements, without describing the obligations those agreements contain (or whether they also contain additional contributions to the Developer by public entities), and for which the Developer provides no record citations. Even assuming we accept the Developer's unsupported valuations for obligations (and contingent obligations) imposed by the Agreement, there is no basis to accept the Developer's bare assertion of obligations imposed when it provides no record support for the obligation itself. " 'Any statement in a brief concerning matters in the appellate record—whether factual or procedural and no matter where in the brief the reference to the record occurs—*must be supported by a citation to the record*.' [Citation.] We have the discretion to disregard contentions unsupported by proper page cites to the record." (*Professional Collection Consultants v. Lauron* (2017) 8 Cal.App.5th 958, 970.) We decline to consider obligations on the Developer purportedly imposed by other agreements, for which the Developer provides no record support. Subtracting these obligations from the remaining ones leaves the Developer required to spend approximately $5.4 million.

Thus, even considering the transaction as a whole, the Agreement resulted in a net loss of $3.5 million for the Redevelopment Agency: the property conveyed by the Redevelopment Agency was worth $6.4 million more than the property it received, the Redevelopment Agency contributed an additional $2.5 million in money or the equivalent of money, and the Agreement obligated the Developer to spend $5.4 million. Accordingly, the Redevelopment Agency paid money to or on behalf of the Developer, and transferred assets to the Developer for less than fair market value. (§ 1720, subd. (b)(1), (3).)

III. *The Statutory Exceptions Do Not Apply*

The Developer argues that, even if the Nut Tree Project was paid for in part by public funds, it falls within a statutory exception and is therefore not a public work. The DIR determination found the exceptions did not apply.

The Developer primarily relies on section 1720, subdivision (c)(2), which provides the following partial exemption: "If the state or a political subdivision requires a private developer to perform construction, alteration, demolition, installation, or repair work on a public work of improvement as a condition of regulatory approval of an otherwise private development project, and the state or political subdivision contributes no more money, or the equivalent of money, to the overall project than is required to perform this public improvement work, and the state or political subdivision maintains no proprietary interest in the overall project, then only the public improvement work shall thereby become subject to this chapter." (§ 1720, subd. (c)(2).)

We agree with DIR and the Union that the Redevelopment Agency maintained a proprietary interest in the project and the exception therefore does not apply.[10] Most significantly, pursuant to the Agreement and a related contract between the Redevelopment Agency and the Developer, the Redevelopment Agency owns real property including an event center and leases the event center to the Developer for rent of one dollar per year plus a percentage of the Developer's net profits from operating the center. The Developer argues only the properties conveyed to the Developer under the Agreement constitute the Nut Tree Project, and the properties retained by or conveyed to the Redevelopment Agency are not part of the project. The Developer relies on the following provision in the Agreement: "The purpose of this Agreement is to set forth the Parties' mutual understanding and agreement regarding the [Redevelopment] Agency/[Developer] Property Exchange, and, following such property exchange, the development and operation of the Post Exchange [Developer] Parcels . . . ." Courts

[10] Because of this conclusion, we need not decide whether the remaining elements were satisfied.

consider "the totality of the facts" to determine what is " 'the "complete integrated object" ' " that constitutes the development project, recognizing that the integrated object is often " 'composed of individual parts.' " (*Cinema West, supra,* 13 Cal.App.5th at pp. 211–212.) The contract itself is neither dispositive nor persuasive on the issue, because " 'an awarding body and a contractor often have strong incentives to avoid the prevailing wage law and thus may structure their contracts to circumvent it.' " (*Id.* at p. 211.) The City's comprehensive "Nut Tree Ranch Policy Plan," which "serves as the guideline for master planning the development and use of the Nut Tree Ranch area," identifies the event center property as part of the "Nut Tree Core Area."[11] Even the Agreement indicates the significance of the event center to the development project as a whole, requiring that the Developer rent the event center and contemplating an "Event Center Operating Agreement . . . governing the operation of the . . . Event Center Parcel . . . ." We conclude the event center property is part of the overall Nut Tree Project.[12] Thus, the Redevelopment Agency's ownership of the event center property and receipt of rent based on a percentage of the Developer's net profits from the event center constitutes the maintenance of a proprietary interest in the overall project and renders the exception inapplicable.

The Developer also briefly argues the public contribution was "de minimis in the context of the project," thereby excepting the project from the PWL pursuant to section 1720, subdivision (c)(3). (See § 1720, subd. (c)(3) ["If the state or a political subdivision

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[11] We grant the Developer's unopposed request for judicial notice of the Nut Tree Ranch Policy Plan. We deny the Developer's request for judicial notice of certain legislative history and DIR determinations, as well as the Union's request for judicial notice of DIR determinations, as these records are not relevant to our resolution of this appeal.

[12] The Developer also points to a 2014 letter from the City stating neither it nor the Redevelopment Agency "owns or has any ownership or proprietary interest in [the Developer's] 36.65-acre development." (Elsewhere, such as in the City's Nut Tree Ranch Policy Plan and in a City staff report recommending execution of the Agreement, the development is described as encompassing approximately 96 acres.) The Developer cites no authority that we should defer to the City's opinion to determine the scope of the project, and we decline to do so.

reimburses a private developer for costs that would normally be borne by the public, or provides directly or indirectly a public subsidy to a private development project that is de minimis in the context of the project, an otherwise private development project shall not thereby become subject to the requirements of this chapter."].) We assume, without deciding, that (as the Developer asserts) an overall subsidy of up to two percent of the total project is de minimis and the total cost of the project was $101 million. In light of our conclusion that the Redevelopment Agency's subsidy was $3.5 million, this threshold is exceeded. The de minimis exception does not apply.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

SIMONS, J.

We concur.

JONES, P.J.

NEEDHAM, J.

(A150087)